



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 266 OF 2018**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 88 OF THE KENYA RAILWAYS CORPORATION ACT**

**BETWEEN**

REPUBLIC.....APPLICANT

**VERSUS**

THE MANAGING DIRECTOR,

KENYA RAILWAYS CORPORATION.....RESPONDENT

EX PARTE :

SAMUEL MUGWE GIOCHE

**JUDGMENT**

**The Application**

1. The *ex parte* Applicant herein, Samuel Mugwe Gioche, was the Respondent in Civil Appeal Number 501 of 2008, wherein judgement was entered in his favour arising from an accident in which his wife suffered fatal injuries. Kenya Railways Corporation, the Respondent herein, was the Appellant in the said appeal, and had appealed the judgment of the trial Court which had found it 100% liable for the said accident, and awarded general and special damages as well as costs to the Applicant.

2. The Applicant now seeks the following orders in an application by way of an Amended Notice of Motion dated 17<sup>th</sup> October 2018:

a) THAT an order of mandamus do issue against the 1<sup>st</sup> Respondent to pay to the applicant the judgement debt herein in the sum of ksh 1,392,130/= together with all accrued interest at court rates from 19<sup>th</sup> October, 2017 till full payment arising from the judgement of Civil Appeal Number 501 of 2008- Kenya Railways Corporation Limited vs Samuel Mugwe Gioche delivered on 24<sup>th</sup> October 2012.

b) THAT in default of compliance with the order of mandamus and failure to pay the judgement debt in the sum of Kshs 1,392,130/= together with all accrued interest at court rates from 19<sup>th</sup> October 2017, the order of mandamus be deemed as sufficient notice under Section 30(1) of the Contempt of Court Act,2016 to the Managing director of the 1<sup>st</sup> Respondent and the persons holding the office of the 2<sup>nd</sup> Respondents requiring them to show cause why contempt of court proceedings should not be commenced against them thirty(30) days after service of the Orders of Mandamus;

c) That in default of compliance with the order of mandamus and failure to pay the judgement debt in the sum of Kshs. 1,392,130/=together with all accrued interest at court rates from 19th October,2017 thirty days after service, and failing to show sufficient cause for non-compliance with the Orders of mandamus, the Applicant be at liberty to commence contempt of Court proceedings against the Managing Director of the 1<sup>st</sup> Respondent and the persons holding the office of the 2<sup>nd</sup> Respondent for them to be personally summoned to Court, proceeded against them and/or committed to civil jail for Contempt of this Honourable Court;

**d) That the Respondents be condemned to bear the Costs of this Application**

3. The Applicant relied on a verifying affidavit and statutory statement sworn on 17<sup>th</sup> October 2018 by his Advocate, Daniel Gachiengo Gitau, and Pursuant to leave granted by the Court on 2<sup>nd</sup> April 2019, the Applicant filed an Amended Statement dated 24<sup>th</sup> April 2019. His advocate in addition filed submissions dated 17<sup>th</sup> December 2018.

4. The Applicant herein was the Respondent in Civil Appeal Number 501 of 2008 wherein he was represented by Messrs Gachiengo Gitau & Co. Advocates. Judgment was entered in the Applicant's favour and costs awarded accordingly in addition to the decretal sum. According to the Applicant, whereas the Respondent paid the decretal sum, it has failed to pay the taxed costs of Kshs. 1,392,139/=, which continues to accrue interest at court rates from 19<sup>th</sup> October 2017. It is the Applicant's case that its Advocates Bill of Costs has already been taxed and allowed by the Deputy Registrar and judgment entered thereon. Further, that a Certificate of Taxation has been issued for Kshs. 1,392,130/= plus interest accruing from 19<sup>th</sup> October till payment in full. It is contended that the Respondent is in breach of its obligation to pay the owed sum despite numerous notices and reminders.

5. His advocate contends that they filed a Bill of Costs against the 1<sup>st</sup> Respondent, who were dully and ably represented by M/S Musyoka Wambua and Katiku Advocates which was taxed and allowed. Thereafter, they wrote several notices and reminders to the Respondent to pay the monies but to no avail. That the awarded costs amount to kshs 1,392,130/= which is due and continues to accrue interest at court rates. He therefore contended that in the circumstances, an order of mandamus ought to issue as the Respondent will continue with the disobedience of the orders and thus erode the dignity and confidence of the Court.

6. It was the Applicant's submission that he seeks the orders of mandamus against the Respondent for the failure to honour a Court Judgement in Civil Appeal number 501 of 2008, where the Respondent was ordered to pay a sum of ksh 1,392,130/=. Further, that the Respondent's affidavit does not address the substantive issues raised in the application and therefore stands unopposed, the main issue being the non-payment of the decretal sum. They relied on the case of **Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 Others, [1997] eKLR** for the issuance and scope of the order of mandamus.

7. The Applicant explained how the matter came about and submitted that he made every effort to have the taxed amount paid in full, but to no avail. He further submitted that the Respondent as mandated under section 88 of the Kenya Railways Corporation Act has failed to honour its obligations. Further, that Court orders are not granted in vain, and it's only fair the Court issues the orders in the application. In closing they submitted that the Respondent should not be allowed to hold the Court in contempt and should be compelled to pay the amount.

**The Response**

8. The application was opposed by Philip Mainga, the Respondent herein, in a replying affidavit he swore on 7<sup>th</sup> November 2018. The Respondent's advocates on record, Mwaniki Gachoka & Company Advocates, also filed written submissions on the application dated 28<sup>th</sup> January 2019. The Respondent's case was that Daniel Gachiengo Gitau, who had initially been named in this suit as the applicant, was the Applicant's advocate in **Civil Appeal No 501 of 2008 - Kenya Railways Corporation vs Samuel Mugwe Gioche**. He conceded that judgement was entered in favour of Samuel Mugwe Gioche therein, who is therefore the only rightful person who can institute the proceedings.

9. Based on the foregoing he urged that Daniel Gachiengo is a stranger to the suit and lacks the *locus standi* to institute the judicial review proceedings and swear the affidavits. He was of the view that the Court erred in law when it granted a stranger (Daniel Gachiengo Gitau) leave to file the application. He added based on legal advice that the same is misconceived, incompetent bad in law and ought to be struck out. It was his case the Court directed the Applicant's advocate on 8<sup>th</sup> October, 2018 to amend the application to reflect the correct parties and true position, but the advocate failed to honour the directive as and it remains defective and should be dismissed.

10. Mr. Maingi, who was the Respondent's advocate, submitted that the application is incompetent *ab initio*. That Gachiengo Gitau and Company Advocates sought leave to file the application which was granted on 25<sup>th</sup> July 2018, and the rationale of leave being sought is to sieve out applications which appear to be abuse of the court process. He placed reliance on the case of **R vs Panel for Takeover and Mergers exp Datafin (1987) Q B 815** for the proposition that at leave stage the applicant must demonstrate that he /she has sufficient interest in the matter otherwise known as *locus standi*.

11. The Respondent submitted that the application for the grant of leave is normally *ex-parte* and the court is restricted to threshold issues, and relied on the cases of **Republic vs County Council of Kwale & another Ex-parte Kondo & 57 Others, Mombasa HCMCA N0 384 of 1996** and **Mirugi Kariuki Vs Attorney General Civil Appeal No 70 of 1991** for the proposition that leave would only be granted if on the material before the court there is a *prima facie* case.

12. It was the Respondent's submission that it's not disputed that judgement was entered in favour of Samuel Mugwe Gioche, and that he is the only one with any rightful and justifiable interest in seeking leave to file the suit and not the advocate Daniel Gachiengo who acted as his advocate. Therefore, that the Court erred in both law and fact by granting a stranger leave in the first instance.

13. In addition, that the Court granted the Applicant leave to amend the application dated 17<sup>th</sup> October 2018. However, that the statutory statement and affidavit is still being deposed by Daniel Gachiengo Gitau, the Applicant's advocates with no mention or involvement of the Applicant, rendering the entire application defective.

14. The issues raised by the Respondent were addressed and disposed of by orders made by this Court on 8<sup>th</sup> October 2018, granting the Applicant leave to amend its Notice of Motion, and further in a ruling of this Court delivered on 2<sup>nd</sup> April 2019, wherein the judgement on the instant Amended Notice of Motion was deferred, pending the necessary amendments to the pleadings filed by the Applicant. The

following orders were given by this Court in this regard:

- a) The Applicant was granted leave to file and serve an amended statement within thirty (30) days of the date of the ruling.
- b) The Respondent was also granted leave to file and serve a further affidavit and supplementary submissions if need be, within 14 days of service of the Amended Statement.
- c) This matter thereafter be mentioned to set a new judgment date.

15. The Respondent did not file any other affidavits or submissions after the said ruling. The issues raised by the Respondent in their response and submissions were therefore largely on whether the instant Application was properly before this Court, which were dealt with by the Court in its ruling as aforesaid.

### **The Determination**

16. I have considered the pleadings and submissions by the Applicant and Respondent, and the single issue pending determination is whether the Applicant is entitled to the orders sought herein. I am in this regard guided by the decision by the Court of Appeal on the nature of the remedy of mandamus in its decision in **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR**, wherein it was held as follows:

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed..... .”**

17. It is not disputed that judgment was entered in favour of the Applicant in **Civil Appeal Number 501 of 2008** and that costs were awarded to the Applicant in addition to the decretal sum. The Applicant produced a copy of the judgment in Civil Appeal Number 501 of 2008 whose costs are the subject matter of the instant Application as “Annexure DGG 1” as well as a copy of the Certificate of Costs for taxed costs of the sum of Kshs 1,392,130/= issued therein on 23<sup>rd</sup> November 2017 as “Annexure DGG 2”. The Applicant has produced the correspondence in demand of the owed monies as “Annexures DGG 3a, 3b and 3c”. The question that therefore requires to be answered is whether the Respondent is under a public duty and obligation to satisfy the decree and orders issued in favour of the Applicant.

18. The Applicant relied upon Section 88 of the Kenya Railways Corporation Act, which provides that:

**"Notwithstanding anything to the contrary in any law--**

**(a) where any judgment or order has been obtained against the Corporation, no execution or attachment, or process in the nature thereof, shall be issued against the Corporation or against any immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixture or fittings; but the Managing Director shall, without delay, cause to be paid out of the revenue of the Corporation such amounts as may, by the judgment or order, be awarded against the Corporation to the person entitled thereto;**

**(b) no immovable property of the Corporation or any of its trains, vehicles, vessels or its other operating equipment, machinery, fixtures or fittings shall be seized or taken by any person having by law power to attach or distrain property without the previous written permission of the Managing Director.”**

19. Whereas Section 88(a) prohibits any execution or attachment as against the Kenya Railway Corporation, the section provides that the Managing Director shall without delay, cause to be paid out of the revenue of the Corporation, such amounts as may be awarded against the Corporation to the person entitled thereto. The Managing Director is thus under a statutory duty to pay any monies awarded pursuant to a judgment, such as the one awarded to the Applicant herein.

20. In this respect, I resonate with the finding. in the case of **Lucy Nyamoita Momanyi v Managing Director, Kenya Railways Corporation & Another [2018] eKLR** that it is legitimate for this Court to issue an order of mandamus to the Respondent who is the Managing Director of Kenya Railway Corporation to pay the Applicant from the funds of the said Corporation in compliance with an order and decree of the Court.

21. In the premises, I find that the Applicant's Amended Notice of Motion dated 17<sup>th</sup> October 2018 is largely merited. However, I note that the Applicant has, in addition to the prayer for an order of mandamus, also sought orders seeking to commit the Respondent for contempt of Court in the event of failure to pay the taxed costs. These prayers are premature at this stage, as they cannot issue before it is shown that the Respondent has been served with orders of this Court compelling him to pay the taxed costs and he has refused to do so.

22. I accordingly grant the following orders:

**I. An order of mandamus directed to the Managing Director of Kenya Railways Corporation to comply and pay the Applicant herein, Samwel Mugwe Gioche, the judgement debt herein in the sum of Kshs 1,392,130/= together with all accrued interest at court rates from 23<sup>rd</sup> November, 2017 until full payment, being the taxed costs arising from the judgement of Civil Appeal Number 501 of 2008- Kenya Railways Corporation Limited vs Samuel Mugwe Gioche delivered on 24<sup>th</sup> October 2012.**

**II. The Applicant shall have the costs of the Amended Notice of Motion dated 17<sup>th</sup> October 2018 of Kshs 50,000/=.**

23. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 29<sup>th</sup> DAY OF JULY 2019**

**P. NYAMWEYA**

**JUDGE**